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Statutes

Supreme Court of the United States

OCTOBER TERM, 1946

No.

CITY OF FRANKLIN
Petitioner

v.

COLEMAN BROS., CORPORATION
Respondent

CITY OF FRANKLIN
Petitioner

v.

COLEMAN BROS., CORPORATION
Respondent

This case is one in which the respondent corporation is seeking to recover from the petitioner the sum of twelve thousand two hundred fifty seven ($12,257.00) dollars which it alleges has been unlawfully and illegally collected by the petitioner on assessment of taxes on personal property situated on land of the United States of America. Specifically this sum represents assessments against the personal property of the respondent corporation for the years 1940 and 1941.

The cause was instituted in the District Court for the District of New Hampshire on May 17, 1944.

The District Court for the District of New Hampshire rendered a decision on December 29, 1944, and judgment was entered by direction the 2nd day of January, 1945; said decision is reported in 58 Federal Supplement 551. (Also, Transcript of Record, Pages 8 to 16)

Cross appeals were taken to the United States Circuit Court of Appeals for the First Circuit (Docket numbers 8045 and 8046). On December 13, 1945, a decision by said Court was rendered and the same is reported in 152 Federal (2nd) 527. (Transcript of Record, Pages 114 to 125.)

An extension within which to file a petition for writs of certiorari was granted March 13, 1946, extending the same to and including April 15, 1946.

JURISDICTIONAL STATEMENT

Jurisdiction of the Supreme Court of the United States is invoked under Judicial Code, Section 240 (U. S. C. A. Title 28, Section 347). The questions with respect to which petition for certiorari is sought are of great public concern for the people of the State of New Hampshire and also of grave importance to the City of Franklin; and, they involve a conflict of decisions between the United States Circuit Court of Appeals and the Supreme Court of New Hampshire.

STATEMENT OF THE CASE

In these proceedings Coleman Bros., Corporation, a Massachusetts corporation duly established by law, is seeking from the City of Franklin, a municipal corporation duly established under the laws of the State of New Hampshire, the sum of twelve thousand two hundred fifty-seven dollars ($12,257.00) which it alleges has been unlawfully and illegally collected by the City of Franklin on personal property situated on land owned by the Government of the United States. Specifically this sum represents assessments against the respondent corporation for the years 1940 and 1941. The above entitled cause was instituted in the District Court for the District of New Hampshire on May 17, 1944. Prior to trial your petitioner seasonably moved for a dismissal of the action on the ground that the court lacked jurisdiction of the subject matter.

In the spring of 1940, the petitioner's assessors presented an inventory to the respondent's agent in New Hampshire, requesting the same be completed for the purpose of an assessment. The respondent corporation refused and it returned said inventory with a letter as follows:

"We believe after due investigation, that our equipment on our job at Franklin, N. H., is not taxable by the City of Franklin because of the fact that we are performing construction work on

a United States Army Reservation." Finally an inventory was filed accompanied by a protest.

On August 1, 1940, the respondent corporation was notified of the tax assessment and subsequently it sent a check to the petitioner together with a letter of protest dated November 22, 1940 (Transcript of Record, Page 107, Exhibit No. 19A).

A protest was also written on the inventory filed for the year 1941 and again the respondent corporation was notified of the tax assessment on August 1, 1941. On November 17, 1941, the respondent forwarded its check in payment for taxes assessed by the petitioner's assessors accompanied by a letter of protest (Transcript of Record, Page 108, Exhibit 22A).

There is no evidence of restraint nor of seizure; in fact, the collector's conduct consisted simply of mailing the tax notices to the respondent corporation. (Transcript of Record, Pages 110-111, Exhibits 22A-23). The witnesses for the respondent asserted they did not, nor did they know anyone else on behalf of the Coleman Bros., Corporation to ever file a petition for abatement in accordance with the laws of the State of New Hampshire or to ever institute an action against the petitioner as the result of either or both assessments or as the result of any payments of the demanded taxes.

There is no evidence of any demand having been made for a refund of moneys paid to the City of Franklin other than the institution of the present action.

Questions Presented

The petitioner, the City of Franklin, contends that the United States Circuit Court of Appeals for the First Circuit erred in failing to decide:

(1) The statutory remedy (N. H. Rev. Laws, Chapter 77, Sections 13, 14) to refund of taxes wrongfully collected is exclusive.

(2) That the action was not maintainable in Federal Court; that the City of Franklin had not consented to be sued; that the statutes do not provide for suits as presented in the instant case.

(3) That the payments made by the respondent, Coleman Bros., Corporation, to the petitioner, the City of

Franklin, were made voluntarily.

(4) That the respondent, Coleman Bros., Corporation, is estopped by its own conduct and is therefore guilty of laches.

(5) That the respondent, Coleman Bros., Corporation, is not entitled to interest.

Argument

STATUTORY REMEDY FOR RECOVERY OF MONEY WRONGFULLY COLLECTED AS TAXES FOR THE STATE OF NEW HAMPSHIRE IS EXCLUSIVE

The United States Circuit Court of Appeals for the First Circuit ascertained that Coleman Bros., Corporation clearly had a remedy under New Hampshire Revised Laws, Chapter 77, Sections 13 and 14, which reads as follows:

> "13 By Selectmen. Selectmen, for good cause shown, may abate any tax assessed by them or by their predecessors. All applications for abatement shall be in writing.
>
> 14 By Court. If they neglect or refuse so to abate, any person aggrieved, having complied with the requirements of Chapter 75, may, within six months after notice of such tax, and not afterwards, apply by petition to the superior court in the county, which shall make such order thereon as justice requires."

The Court, however, concluded that inasmuch as the City of Franklin had no jurisdiction of the respondent corporation nor of its property the remedy under the New Hampshire Law for the recovery of money wrongfully collected was not exclusive. In this respect, there is a conflict between the Supreme Court of New Hampshire and the Circuit Court of Appeals.

The New Hampshire Court has stated repeatedly: "The decision in *Edes* v. *Boardman* (1879) established the rule which has ever, since been followed that as to 'any error correctible on appeal' the remedy is exclusive" . . . Cases before *Edes* v. *Boardman* held that one who has paid a tax illegally assessed may recover it back from the town in an action of assumpsit. That decision established for this jurisdiction the rule that the remedy by petition for abatement abolished the common law action to recover back taxes."

Bretton Woods Co. v. *Carroll* (1930), 84 N. H. 428, 429
Edes v. *Boardman* (1879), 58 N. H. 580.

The statute in question is not confined to cases of overvaluation, but applies alike to cases where the whole assessment is illegal.
Savings Bank v. *Portsmouth,* 52 N. H. 17
Perley v. *Dolloff,* 60 N. H. 504
Locke v. *Pittsfield,* 63 N. H. 122
Rowe v. *Hampton,* 75 N. H. 479
Kaemmerling v. *State,* 81 N. H. 405

In *Nottingham* v. *Newmarket Mfg. Company* (1930), 84 N. H. 419, the defendant, a foreign corporation, had nothing of value unless there was interest in certain indentures. One of the questions raised: whether the defendant had any taxable property. The court ruled that the defendant's remedy was by petition for abatement. The question whether the defendant has taxable estate is not open in this suit.

In another instance wherein there was no jurisdiction to impose any tax at all, may be found in *Canaan* v. *Enfield Village Fire District,* 74 N. H. 8. An assumpsit action was brought to recover the amount of a tax assessed upon the property of the defendant located in Canaan which was purchased pursuant of legislative authority. The defendant contended it was exempted from taxation. In the course of its decision, the court stated: "If the property was not taxable, or the tax was excessive, the defendant's remedy was by an application to the selectmen of Canaan for an abatement, and, in case they declined to grant it, to seasonably petition the court for a like purpose. By so doing, a hearing could be had and any error in the assessment corrected."

In still another case, *Larkin* v. *Portsmouth,* 59 N. H. 26, a petition for abatement was brought later than provided for by the statute. The plaintiff was taxed upon $3000.00, money at interest, Plaintiff had no money on hand, at interest or on deposit. It was held: "A plain and positive provision of law cannot be disregarded, even for the purpose of correcting gross injustice. Petition too late."

The New Hampshire Court has indicated several times an intention to include every possible situation involving recovery of moneys wrongfully collected within the scope of the statute. In very clear, concise language, it stated in *Rowe* v. *Hampton,* 75 N. H. 479: "Plaintiff's remedy is by petition in abatement. . . . even though the 'whole assessment is illegal'. It is not merely an adequate remedy, but the statute plainly indicates that it was *intended to be the only* available remedy for errors that can be corrected on appeal."

And this remedy is for the correction of errors of law or of fact. *School District* v. *Carr,* 63 N. H. 201

The City of Franklin submits that the New Hampshire Court not only did not intend to create an exception but deliberately undertook to make itself clear on the point that in cases whereby recovery for money wrongfully collected is sought, a petition in abatement is the only available remedy.

THAT THE ACTION WAS NOT MAINTAINABLE IN FEDERAL COURT; THAT THE CITY OF FRANKLIN HAD NOT CONSENTED TO BE SUED; THAT THE STATUTES DO NOT PROVIDE FOR SUITS AS PRESENTED IN THE INSTANT CASE

The right of the plaintiff to maintain this action in a Federal Court depends, first, upon whether the action is against an individual or against the State or a political sub-division thereof. Secondly, if the action is determined to be against the State or a political sub-division thereof, the question arises as to whether or not the State, or a political sub-division thereof, has consented to suit against itself in the Federal Court.

The complaint itself ascertains that the action is against the City of Franklin, hence, it is not against an individual. It must follow that this action is plainly distinguishable from those to recover personally from a tax collector money wrongfully exacted by him under color of state law. . . *Atchinson & Ry. Co.* v. *O'Connor,* 223 U. S. 280 (Colorado statute left the taxpayer to his remedy against the collector).

By its taxation statutes New Hampshire creates a judicial procedure for the prompt recovery by the citizens of money wrongfully collected as taxes. It is the sovereign's method of tax administration. The statutes designate what steps are to be taken for redress and it empowers the tribunal and courts to do complete justice by determining the amount properly due and directs the officials to pay back any excess or all of the tax received to the taxpayer. Thus the statute makes sure the taxpayer's recovery of illegal payments.

When a State authorizes a suit against itself to do justice to taxpayers who deemed themselves injured by any exactions, it is not consonant with our dual system for the Federal Courts to read the consent to embrace Federal as well as State Courts. The Federal Government's consent to suit against itself, without more, in a field of Federal power does not authorize a suit in a State Court. *Minnesota* v. *United States*, 305 U. S. 384, 389; the same reasoning may be applied to state's consent, in a field of state power (for instance collection of illegal taxes) as not authorizing suit in a Federal Court. The statute provides a complete procedure including a review by the Superior and Supreme Courts, as the case may be, which are given authority to affirm, modify or annul the action of the assessors. Therefore it becomes clear that the legislature of New Hampshire was consenting to suit in its own courts only. *Chandler* v. *Dix*, 194 U. S. 590. *Matthews* v. *Rodgers*, 284 U. S. 521.

As demonstrated in other parts of the brief, the New Hampshire Court has constructed the statutory remedy for the recovery of money wrongfully collected to be exclusive. The statute under construction also dictated the manner by which one aggrieved could recover and finally it designated, in cases where the officials neglected or refused to act, just what tribunal had jurisdiction of the cause. Unlike similar other statutes, the New Hampshire statute did not give the aggrieved party his choice of court such as "courts of jurisdiction"; it tersely said: "to the Superior Court in the county. . .". Thus the legislature intended to give jurisdiction only to its state court.

THAT THE PAYMENTS MADE BY THE RESPONDENT, COLEMAN BROS., CORPORATION, TO THE CITY OF FRANKLIN, WERE MADE VOLUNTARILY

The uncontradicted testimony reveals that Coleman Bros., Corporation were notified of its being taxed on August 1, 1940, for the year 1940 and on August 1, 1941, for the year 1941. Nearly four months lapsed before the taxes were paid in each year. There is no evidence of restraint nor of seizure. The Circuit Court of Appeals held that the provisions of the statutes constituted legal compulsion. [Transcript of Record pages 119, 120] This appears from the cases below to be in conflict with other circuit courts and also with decisions in the Supreme Court of the United States.

In a case in the eight circuit, *Security National Bank of Watertown, S. D.* v. *Young*, 55 Fed. (2) 616 the following appears:

> "The only claim of duress or coercion is that the payments involved were made through the coercion and duress of the South Dakota Statute. South Dakota Statute provided that, if the tax on personal property should not be paid when due, it should be collected through the sheriff, and that, in addition to other large and burdensome fees and mileage chargeable and collectible by the sheriff, there might be added to such taxes a penalty of 15% of the amount due. To hold that the provisions of the statute constituted a constructive duress or coercion would in effect render the payment of practically all taxes involuntary and subject to be recovered back. As said in *Phillips* v. *City of Portsmouth*, 115 Va. 180: 'To hold that imposition of a penalty which is designed to accelerate the prompt payment of taxes, constitutes a duress would be to render the payment of the great bulk of our taxes involuntary."

In *Mayor of Baltimore* v. *Liffermann*, 45 Am. Dec. 145, 153, it is said; "To rule allowing a party to recover money which he once paid, on the ground that it was paid under compulsion, is intended only for the relief of those who are entrapped by sudden pressure into making such payments and who have no means of escaping an existing or imminent infringement of their rights of person or property. Where a party has time and opportunity to relieve himself from his predicament without such a payment, by

a resort to ordinary legal methods, but nevertheless pays the money, the payment will be deemed voluntary, and he cannot recover it."

The following language is found in *Johnson* v. *Crook County,* 100 Pac. 294, "We believe that reason supports the rule that when a tax has been paid without compulsion but with comprehension of its invalidity, or with means of knowledge of its illegality, the liquidation is voluntary and prevents a recovery of the money disbursed, although the payment may have been made under protest . . . . It will be remembered that the complaint herein avers that the sheriff of Crook County obeying the command attached to the roll, notified the plaintiff that his land was taxed to the extent of $364.57, informed him that the exaction was just and due, and that unless the sum was paid he would 'in due time' collect by a sale of the property. It is nowhere alleged that the sheriff was either in the act of selling or that he threatened immediately to do so; or that the plaintiff, believing the menace would be instantly executed, was by the abrupt urgency insnared into meeting the payment, or that he had no other expedient of freeing his property from the lien which the levy of tax created." Payment held voluntary.

Payment of illegal taxes under protest before the taxes had become delinquent and without any demand or threat to levy, merely to prevent the imposition of a penalty and interest which would accrue on the succeeding day, was "voluntary", so that the taxes paid could not be recovered. *Cincinnati N. O. & T. P. R. Co.* v *Hamilton County,* 113 N. W. 361.

In another instance, the court (*San Francisco & N. P. RR Co.* v. *Dinwiddie,* 13 Fed. 789) held: "The assessment was claimed to be void, and it was on that ground that the plaintiff objected to the sale, and paid the money under protest. The means of knowledge of the plaintiff were equal to those of the tax collector. The plaintiff was bound to know the law. If the plaintiff paid where there was no actual seizure or restraint of its goods, merely from a fear that it might be mistaken in law, it acted upon its own judgment as to what was the best course to pursue. It was merely a question of policy not coercion. If there was a mistake

on its part, it was a mistake of law which it was bound to know, and not a mistake of fact. At all events the payment was clearly voluntary."

The Coleman Bros., Corporation in question is in no better position than the plaintiff in *R. R.* v. *Commissioner* (Neb.) 98 U. S. 541, 545. The court quoted part of *Preston* v. *Boston*, 12 Pick (Mass.) 14:

"When, therefore, a party not liable to taxation is called upon peremptorily to pay upon such a warrant, and he can save himself and his property in no other way than by paying the illegal demand, he may give notice that he pays it by duress and not voluntarily, and by showing that he is not so liable, recover it back." The court continues on: "This we think, is the true rule, but it falls short of what it required in this case. No attempt has been made by the treasurer to serve his warrant. He has not personally demanded the taxes from the Company, and certainly nothing has been done from which his intent could be inferred to use the legal process he held to enforce the collection, if the alleged illegality of the claim had been made known to him. All that appears is, that the company was charged upon the tax lists with taxes upon its real and personal property in the county. After all the taxes had become delinquent under the law, but before any active steps whatever had been taken to enforce their collection, the company presented itself at the treasurer's office, and in the usual course of business paid in full everything that was charged against it, accompanying the payment, however, with a general protest against the legality of the charges and a notice that suit would be commenced to recover back the full amount paid. Three years after, and after the decision in *R. R.* v. *McShane* which was supposed to hold that the particular lands now in question were not subject to taxation, suit was brought . . . the payment was not compulsory in such a sense as to give a right to the present action."

In a case where it appeared that the assessment was wholly unwarranted by law and totally void, the court said, in *Detroit* v. *Martin*, 34 Mich. 110; "The plaintiff at the time he paid his tax, paid it with full knowledge of all the facts and circumstances.

He is conclusively presumed to know the law applicable thereto. He is presumed to have known at the time he paid this tax that the statute under which the assessment was made was void, and that a sale constituted no cloud. The threat was therefore a harmless one. It could not have affected the plaintiff as it could not have affected his rights. The assessment was a mere nullity and could not have been enforced in anyway. Yet the plaintiff knowing all of this voluntarily pays."

In a more recent case, *North Miami* v. *Seaway Corporation* (1942) 9 So. (2) 705, the question of payments came under consideration. The court there held: "All tax payments are presumed to be voluntary until the contrary is made to appear, and mere protest when payment is not made to save arrest or seizure or sale of goods does not relieve payment from its presumed voluntary character and does not permit recovery. Every man is presumed to know the law, and if he voluntarily makes a payment which the law would not compel him to make, he cannot afterwards assign his ignorance of the law as a reason why the state should furnish him with legal remedies to recover it. Ignorance or mistake of law by one who voluntarily pays a tax illegally assessed furnishes no ground for a recovery. A mere protest when payment was not made to save arrest or seizure of goods, or a sale is in submission to process and it does not relieve the payment of its presumed voluntary character."

In another case *Gaar, Scott & Co.* v. *Shannon*, 233 U.S. 468, 471 the court in considering payments said: "Neither a statute imposing a tax, nor the execution thereunder, nor a mere demand for payment is treated as duress. It does not follow that there will be a levy on goods, or if there is, the citizen, to avoid the consequences of the levy, may pay the money, regain the use of his property and maintain a suit for the recovery of what has been exacted from him. The legal remedy redresses the wrong . . . ." But, it said an act which declares a (1) 25% penalty, (2) license of company shall be cancelled result in duress if payment is made thereunder if the act is subsequently declared void. The tax in question was a franchise tax required to do business in the State for 10 years. Plaintiff in its action had alleged that it only transacted *interstate* business. The act

applied to *intrastate* business. The court stated: "If therefore the plaintiff had been included in the class to which the statute applied and, under the duress of its automatically enforced provisions, had paid the tax to avoid the disruption of its business, it could have maintained an action to recover the amount thus exacted. In that suit it would have been entitled to a decision on the question as to whether the statute was constitutional and to a review of the judgment if it has been adverse to the company's contention. But the company did not in any sense come within the purview of the act. The plaintiff alleged that it was engaged only in interstate commerce. If so, the statute could not require from it the payment of the tax. The duress of its provisions therefore, operated only on those doing intrastate business; and if the plaintiff on a mere demand, paid the tax imposed by statute applicable only to other corporations, it had no more right to recover than would a dry goods merchant who voluntarily paid a tax illegally imposed on those engaged in the selling of liquor. To permit those not affected by a statute to pay the sum thereby assessed, and then sue for its recovery on the ground that the act was void, would reverse the rule that 'one who would strike down a State statute as violative of the Federal Constitution must bring himself by proper averments and showing within the class as to whom the act thus attacked is unconstitutional'."

It is suggested that the holding of the court below is not in accord with the general line of cases and the same serve to create rather than to avoid conflict between courts of appeal and the state court.

THAT THE RESPONDENT, COLEMAN BROS., CORPORATION IS ESTOPPED BY ITS OWN CONDUCT AND IS THEREFORE GUILTY OF LACHES.

Holding that the Coleman Bros., Corporation seasonably brought its action is in direct conflict with the decisions of the Supreme Court of New Hampshire. The New Hampshire Court has held time and time and again that New Hampshire Revised Laws, chapter 77, sections 13, 14 is the only possible way one can recover taxes wrongfully collected. Said statute has placed

a time limitation within which an aggrieved party may obtain complete and adequate relief. If the entire tax is illegal, the assessment of it may be vacated as effectually as an erroneous decree or judgment can be reversed on an appeal or writ of error. *Edes* v. *Boardman,* 58 N. H. 580, supra.

The Coleman Bros, Corporation maintained from the beginning it was not subject to tax by the City of Franklin and furthermore said city had no jurisdiction whatever. Having paid the taxes for the two years the respondent corporation became dormant until the New Hampshire Court rendered a decision holding that personal property on government owned land was not taxable. *Scribner* v. *Wikstrom* (November 1943) 93 N. H. 17, 34A (2nd) 658. The respondent corporation's conduct is on all fours with *R.R.* v. *Commissioner* (Neb) 98 U. S. 541, supra, a situation where the plaintiff after having paid a tax under protest waited three years and after a certain decision favorable to it before bringing suit.

It is not necessary in New Hampshire to pay a tax in order to find out what a taxpayer's rights are . . . . there is a preventative remedy by making a petition for abatement. Having ignored this remedy although it had ample time within with so to file and having waited 3½ years with respect to the 1940 tax and 2½ with respect to the 1941 tax, Coleman Bros., Corporation should be estopped to assert whatever rights they might have had prior to the expiration of the limitation of time. This question is of great concern to the people of New Hampshire and in particular to the City of Franklin. To allow one to continue on after conducting himself as did the Coleman Bros., Corporation would tend to disrupt the taxation system in New Hampshire and also would lend itself to untold confusion, not forgetting also that it would contradict the judgment of the New Hampshire Supreme Court.

THE RESPONDENT IS NOT ENTITLED TO INTEREST.

An obligation of the State to pay interest, whether as interest or as damages, on any debt overdue, cannot arise except by the consent and contract of the State, manifested by statute, or in a form authorized by statute. *United States* v. *North Carolina,* 136 U. S. 211, 221.

Also, since a taxpayer's right to a refund of taxes wrongfully collected can be enforced only under the statutory remedy therefor and subject to its conditions and restrictions (*Rowe* v. *Hampton*, 75 N. H. 479); (*Bartlett* v. *New Boston*, 77 N. H. 476), he is entitled to interest on such refund only as the statute authorizes it. *Kaemmerling* v. *State*, 81 N. H. 405, 406. There is no provision under New Hampshire Revised Laws Chapter 77, sections 13 and 14 for any interest.

CONCLUSION.

Thus the cases decided by the Supreme Court of New Hampshire clearly indicate that the statutory remedy for the recovery of moneys wrongfully collected as taxes is exclusive and that there are no other available remedies; whereas the United States Circuit Court of Appeals for the First Circuit in effect imposes an exception to an established rule which cannot be traced to any statute nor to any decision.

The authorities cited with respect to the character to be given to payments seems and does conflict with the finding of the United States Circuit Court of Appeals for the first Circuit.

Finally it is submitted this case is of great public interest and importance to the citizens of the State of New Hampshire. Therefore this fact together with the apparent conflict between the Supreme Court of New Hampshire and the Circuit Courts of Appeals seems to your petitioner, the City of Franklin, of sufficient importance to warrant the granting of the writ of certiorari.

City of Franklin

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